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In the Supreme Court of the United States

OCTOBER TERM, 1957

TOMMASO ARGENTO, PETITIONER

v.

HERBERT A. HORN, UNITED STATES COMMISSIONER AND XAVIER NORTH, UNITED STATES MARSHAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Washington 25, D. C.

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The petition for a writ of certiorari seeks review of the judgment of the Court of Appeals for the Sixth Circuit affirming a ruling by the District Court for the Northern District of Ohio, in an action for a declaratory judgment, that petitioner is properly being held for extradition to Italy. This memorandum is filed on behalf of the United States marshal who is holding petitioner, and the United States Commissioner who committed petitioner to custody. Since they are not the real parties in interest in this proceeding, this memorandum is confined to setting forth the views of the United States with respect to the present existence of a valid extradition treaty between

the United States and the Republic of Italy. The ruling of the courts below that there is such a valid existing treaty is in accord with the position taken by the Department of State.

1. The United States and Italy, on March 23, 1868, signed an Extradition Convention (15 Stat. 629) which, as supplemented, was in effect at the time of the United States declaration of war against Italy on December 11, 1941. Article 44 of the treaty of peace with Italy, signed February 10, 1947, and effective September 15, 1947 (61 Stat. 1245, TIAS 1648), provided in pertinent part:

> 1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.[1]

On February 6, 1948, the Italian government was given official notification that the United States desired to keep in force or revive, *inter alia*, the extradition conventions (XVIII Department of State Bulletin 248 (1948)). Since that time, each country has made requests to the other for the extradition of fugitives from its justice.

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[1] Similar provisions appear in the treaties of peace with Bulgaria (61 Stat. 1915, TIAS 1650), Hungary (61 Stat. 2065, TIAS 1651), Rumania (61 Stat. 1757, TIAS 1649), and Japan (TIAS 2490). Each of these countries was notified that the United States wished to continue in force the pre-existing extradition agreements.

Even before the peace treaty, the United States and Italy exchanged notes on April 16 and April 17, 1946, constituting an agreement, to become effective May 1, 1946, to the effect that, in accordance with the understanding of the United States, Article I of the Extradition Convention of 1868 was interpreted as reciprocally applicable to the citizens of the two countries (61 Stat. 3687, TIAS 1699). And previously, in September 1945, the Department of State had instructed the United States Embassy in Rome to request the provisional arrest and detention of a fugitive with a view to his extradition. Thus, the Department of State has consistently taken the position that the extradition conventions were not abrogated by the war, and have been, since the cessation of hostilities between the United States and Italy, fully operative.[2]

2. As just stated, it is the view of the Federal Government, acting through the Department of State, that war merely suspends the operation of extradition treaties, but does not abrogate them. And since the question of whether a treaty has been abrogated or still survives is essentially a question in the realm of foreign affairs, the position adopted by the Department of State and accepted by the other countries involved should not be overturned by the courts. In the area of international affairs, "the judicial department of the government follows the action of the political branch, and will not embarrass the latter by

[2] Although no peace treaty has been signed with Germany, the Department of State regards the extradition treaty with that country as in force at this time. On April 13, 1956, the Federal Republic of Germany expressed its concurrence in this understanding.

assuming an antagonistic jurisdiction." *United States* v. *Lee*, 106 U. S. 196, 209. The Court has insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 361.

This general principle of judicial abstention from the domain of foreign affairs has been consistently applied in various fields touching on this country's international relations. Treaties will normally not be interpreted contrary to a definite position taken by the Executive *vis-a-vis* a foreign country, especially where judicial intervention might well cause difficulties in the sphere of foreign relations.[1] In particular, the courts have deferred to the Department of State in the interpretation and coverage of extradition treaties. See *Terlinden* v. *Ames*, 184 U. S. 270, where the Court accepted the position of the Department of State as to the continuing effect of an extradition treaty with Prussia after the unification of Germany; and *Ivancevic* v. *Artukovic*, 211 F. 2d 565, 573 (C. A. 9), certiorari denied, 348 U. S. 818, as to an extradition treaty with Serbia after the creation of Yugoslavia. See, also, *Charlton* v. *Kelly*, 229 U. S. 447,

[1] *E. g.*, *Foster* v. *Neilson*, 2 Pet. 253, 307–309; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153–155; *Terlinden* v. *Ames*, 184 U. S. 270; *Charlton* v. *Kelly*, 229 U. S. 447, 468, 474–476; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspects of Foreign Relations* (1933), 71–78.

468, 474–476; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295.

3. Petitioner seeks to distinguish *Terlinden* v. *Ames*, *supra*, on the ground that it involved merely a question as to the continued validity of a treaty and not the issue of abrogation by war. While recognizing that treaties may survive a 'war,' his position is essentially that, unless a treaty remains fully effective during the period of hostilities, it *must* be deemed abrogated beyond possibility of reactivation after hostilities have ceased. He argues that a "treaty either falls or survives the impact of war, none is 'suspended' " (Pet. 25). There is no warrant, either in this Court's decisions or in the State Department's practice, for such an all-or-nothing position. In one of its earliest cases recognizing the survivorship of treaties during war, *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 494–495, this Court noted:

> We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, *but are, at most, only suspended while it lasts;* and unless they are waived by the parties, or new and repugnant stipulations are made, *they revive in their operation at the return of peace.* [Emphasis added.]

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[1] *Clark* v. *Allen*, 331 U. S. 503; *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464; *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643.

And in *Clark* v. *Allen*, 331 U. S. 503, 508, the Court discussed the question of whether war necessarily *suspends or abrogates* treaties.[5]

Petitioner's argument that an extradition treaty is incompatible with the maintenance of a state of war (Pet. 23) depends on his assumption that there can be no suspension of a treaty during a period of hostilities. If there can be suspension, an extradition treaty, wholly unrelated to the causes of war and peace, is manifestly the type of international agreement which would be deemed merely suspended for the period of hostilities. See *The Sophie Rickmers*, 45 F. 2d 413, 421 (S. D. N. Y.), where the court (per Mack, C. J.) considered a pre-war commercial treaty with Germany effective when trade relations, interrupted by war, were resumed after World War I. Petitioner relies upon a classification formulated by Westlake, which this Court quoted in *Karnuth* v. *United States*, 279 U. S. 231, 240, as being a summation of all treaties which may survive a war, and claims that this summary would not include extradition treaties. But aside from the fact that the Court, in quoting that summary, obviously did not intend to decide its applicability to questions not before it, the very passage which petitioner quotes (Pet. 21–22) refers to "transitory or dispositive treaties"

[5] See, also, the ruling of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*, United States and Great Britain, Sept. 7, 1910 (Scott, *The Hague Court Reports* (1916), 141, 159):

> "* * * International law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended by it; * * *."

including those "having no conceivable connection with the causes of war or peace." While an extradition treaty may not be a "transitory or dispositive" treaty, it falls within the rationale of that classification since it is wholly unrelated to the causes of war and peace. *Clark* v. *Allen*, 331 U. S. 503, 508, in dealing with the issue of whether a treaty was either suspended or abrogated by war, indicated that the test of survivorship was whether there was a national policy inconsistent with the enforcement of a treaty in whole or in part. No national policy would preclude the operation of an extradition treaty as soon as appropriate conditions—the resumption of diplomatic relations—made its operation possible.

4. In any event, the Senate, in giving its advice and consent to the Italian Peace Treaty gave its advice and consent to Article 44, *supra*, p. 2. All of the treaties of which notification was given pursuant to Article 44, including the treaties of extradition, had been previously ratified and were in existence at the time the Peace Treaty with Italy was ratified. Thus, the Senate informed the Executive in advance that, as to any such treaty, there was consent of the Senate should the Executive desire to keep the treaty in effect. Since the negotiation and conclusion of treaties is for the Executive, this was not a delegation of authority, but advance advice and consent to acts of the Executive within the constitutional authority of that branch of the government. Cf. *Wilson* v. *Girard*, No. 1103, Oct. Term, 1956, decided July 11, 1957; see also *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

CONCLUSION

For the foregoing reasons, the decision of the court below as to the present existence of a valid extradition treaty between the United States and Italy is correct. There is no conflict of decisions. It is therefore respectfully submitted that there is no occasion for review of this aspect of the decision.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

AUGUST 1957.

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